

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-220471

DATE: January 3, 1986

MATTER OF: Hayes International Associates

DIGEST:

Protest is untimely where a detailed statement of the factual and legal grounds for it is not filed within 10 working days after the protester knows or should have known the grounds. Mere notice of an intent to protest in the future is not sufficient for timeliness purposes.

Hayes International Associates protests the award of a contract to the Vac-Hyd Corporation under request for proposals (RFP) No. DAAC83-85-R-0047, issued by the Corpus Christi, Texas, Army Depot. Hayes questions the contracting officer's decision to make an award without negotiating with it and challenges Vac-Hyd's status as a small business concern. The protester also alleges that contracting officials must have told Vac-Hyd how Hayes priced its offer, so that Vac-Hyd could offer a price just below that of Hayes. Finally, Hayes asks why its prompt payment discount was not evaluated, since with the discount, the Hayes offer would have been low.

We dismiss the protest as untimely.

The RFP, issued June 3, 1985, solicited offers for a requirements-type contract for the repair of government-furnished T53 Compressor Rotor Blades. The Army received 14 offers; Vac-Hyd's was low at \$5.94 per item for a total price of \$445,500. Hayes' was second low at \$6.13 per item for a total price of \$459,750. On July 25, without holding discussions, the Army awarded the contract to Vac-Hyd and notified Hayes and the other unsuccessful offerors. A synopsis of the award was published in the Commerce Business Daily (CBD) on August 2.

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It is unclear on what date Hayes actually learned of the award. However, the record shows that Hayes was aware of the contracting officer's decision no later than August 23, for on that date it prepared a letter and sent a telegram to our Office, both stating that Hayes "will be protesting the award" and that "formal protest will be submitted as of this date." We received the telegram on August 26 and the letter on August 29; however, we never received further specific grounds for protest. Since both the letter and the telegram expressed only an intent to protest, we did not treat them as a formal protest and did not open a file. This is consistent with our Bid Protest Regulations, which require a detailed statement of the factual and legal grounds for protest and copies of relevant documents. 4 C.F.R. § 21.1(b)(4) (1985).

Subsequently, on September 26, we received a letter from Hayes that contained specific grounds for protest. Since no file had been opened on Hayes' earlier submissions, and since the September 26 letter made no reference to Hayes' earlier correspondence and was worded so that it appeared that Hayes was submitting a protest for the first time, we opened a file based on this letter. Only after our receipt of the agency's administrative report did it become apparent that Hayes had first learned the grounds of its protest much earlier than September 26.

Our Office regards bid protests as serious matters that require effective and equitable procedural standards, so that the parties have a fair opportunity to present their cases and so that protests can be resolved without unduly disrupting the government's procurement process. Therefore, our regulations establish specific deadlines for filing with our Office, and these deadlines are strictly construed. William A. Stiles, III--Reconsideration, B-215922.3, Feb. 19, 1985, 85-1 C.P.D. ¶ 208.

Under our regulations, Hayes was required to file its protest not later than 10 working days after the basis for it was known or should have been known, whichever was earlier. 4 C.F.R. § 21.2(a)(2). As indicated above, Hayes should have known its basis of protest in early August, either from the contracting officer's notice to unsuccessful offerors or the CBD synopsis. Since the earliest communication from Hayes to our Office was received on August 26, it appears that even that submission was untimely.

In any event, as noted above, neither Hayes' initial telegram nor letter set forth a detailed statement of the legal and factual grounds of protest, and the September 26 letter which did so is clearly untimely. In this regard, the time for fixing the date of a protest for timeliness purposes is when the protest is actually filed, and not when the protester indicates an intent to file in the future. Decom Systems, Inc., B-215167, Sept. 24, 1984, 84-2 C.P.D. ¶ 333.

We therefore find the protest untimely. For the benefit of the protester, however, we point out the following:

First, a contracting agency may make an award without holding discussions when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the government. See 10 U.S.C.A. § 2305(b)(4)(A)(ii) (West Supp. 1985), as amended by the Competition in Contracting Act of 1984. Here, without consideration of prompt payment discounts (discussed below), acceptance of Vac-Hyd's offer did result in the lowest overall cost to the government. Further, it was in accord with the solicitation, which indicated that the low offeror would receive the award.

Second, the Small Business Administration has conclusive statutory authority to determine matters of small business size status for federal procurement purposes and, therefore, our Office does not consider size status protests. 15 U.S.C. § 637(b)(6) (1982); Mark Dunning Industries, Inc., B-217500, Jan. 18, 1985, 85-1 C.P.D. ¶ 68.

Third, when improper conduct on the part of government officials is alleged, the protester has the burden of proof, and our Office will not rely on inferences alone to find such misconduct. Monarch Engineering Co., B-218374, June 21, 1985, 85-1 C.P.D. ¶ 709.


Finally, the procurement regulations now provide that prompt payment discounts will not be considered in determining the lowest offer. FAR, 48 C.F.R. § 14.407-3; Tri-State Laundry Services, Inc. d/b/a Holzberg's Launderers and Cleaners, B-218042, Feb. 1, 1985, 85-1 C.P.D. ¶ 127.

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Under current regulations, an offered prompt payment discount may be taken if it is earned by the government; it does not, however, play a role in the evaluation of offers.

The protest is dismissed.


Ronald Berger
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General Counsel